No. 82-2045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The government does not challenge petitioners' representations that the issues sought to be reviewed are of major importance, as they govern the implementation of the entire antidumping/countervailing duty programs. Congress has determined that dumping and subsidization of imports distort free market forces, injure American industries and eliminate jobs and employment opportunities for American workers. Just as it has regulated the business conduct of domestic firms through the antitrust laws, Congress has sought, through the antidumping and countervailing duty laws, to regulate the conduct of foreign producers who choose to sell in this market. The

antidumping/countervailing duty regulatory regime is of potential application to all imported merchandise. To date more than 180 administrative findings are in place. Those findings presently cover billions of dollars of trade in products affecting virtually every sector of the economy, including agricultural commodities, basic manufactures, and high technology products. Petition ("Pet.") 3-4. The importance and widespread impact of the issues raised in this litigation are readily apparent.

1. Petitioners' First Question Presented

The government's opposition reinforces the critical need to resolve fundamental differences as to how Congress intended the antidumping and countervailing duty statutes to be administered. Petitioners contend that the 1979 amendments to the antidumping law conferred unconditional rights upon interested domestic parties to participate in the administrative assessment of antidumping and countervailing duties and to appeal assessment determinations to the United States Court of International Trade. Those rights were created specifically for the benefit of domestic industries and workers injured by dumped and subsidized imports. Pet. 13-16.

The government responds by asserting that the Secretary of Commerce may circumscribe the rights created in the 1979 reforms by virtue of a general compromise provision (19 U.S.C. § 1617 (1976) ("section 617")) first enacted in 1922 and never previously used in an antidumping proceeding. The government would have us believe that interested domestic parties have no interest in the assessment of antidumping duties, asserting that the "government is compromising its own rights" when it executes settlement agreements. Brief for the United States in Opposition ("Br. in Opp.") n.9. It contends that "[p]etitioners are strangers to these [settlement] agreements,"

which do not involve "the rights of third parties." *Id.* Although all evidence of Congressional intent is to the contrary (Pet. 13-14 & n.14), the government seeks to elevate this once obscure compromise authority to co-equal status with the specific procedures in the antidumping law. Br. in Opp. 10.

The United States Court of Appeals for the Federal Circuit attempts to resolve these diametrically opposed positions by agreeing with the government that the Secretary has unfettered discretion either to assess duties under the 1979 legislation with all of its attendant procedural safeguards, or to compromise the same duties without so much as giving domestic interests notice and the opportunity for comment. No attempt to harmonize these conflicting statutes is made; nor is there any attempt to provide guidelines as to the appropriate circumstances in which one or the other statute should be applied.

This case will permit the Court to resolve these fundamentally different views regarding the essential nature of the antidumping remedy. It is critical to the proper administration of this vital statute that the Court determine whether mandatory provisions of a statute may be selectively negated without recognizable standards, without notice to the holders of substantial rights, and without even the semblance of judicial supervision.

2. Petitioners' Second Question Presented

Petitioners allege that the report and recommendation required by section 617 were fraudulently prepared and that procedural compliance with that provision was a sham. These allegations were detailed and specific and, in the procedural posture of this case, must be deemed true and construed in a light favorable to petitioners. Pet. 18 n.16.

Fairly read, the decision below stands for the proposition that such allegations are "not proper for judicial inquiry" regardless of sufficiency. Petitioners' Appendix ("Pet. App.") 5a & 8a. Even the government's opposition does not defend the correctness of this holding (Br. in Opp. 15), but merely seeks to justify the results on other grounds.[1]

Implicit in the Federal Circuit's refusal to find jurisdiction over allegations of bad faith is its determination to accord extreme deference to agency action, particularly where foreign policy implications are perceived. The court below not only would permit the Secretary to deprive domestic interests of the elaborate procedural safeguards of the 1979 law, it would also allow him *carte blanche* authority to ignore even the limited protections afforded by section 617.[2] The Federal Circuit's excessive

[1] In its opposition, the government advances a number of factual considerations not of record upon which it speculates the Secretary could have relied in his compromise determination. Br. in Opp. 12-15. These "*post hoc* rationalizations," of course, provide no basis to justify the Secretary's conduct. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971), *quoting Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962). The facts of record as pleaded in the complaint, and necessarily accepted by the court below as true in the posture of this case, are that the statutorily mandated report was not timely provided to the Secretary; compliance with statutory procedures was a sham; and the entire compromise process was carried out in bad faith in an effort to justify a result that had been preordained for political reasons. It was these facts into which the court below held it had no jurisdiction to inquire.

[2] The Federal Circuit went so far as to assert that "the Secretary [in deciding to compromise] is not limited solely to the factors explicated in these [statutory] reports." Pet. App. 7a. The government has taken the position that since the Secretary is not limited in his settlement decision to consideration of the factors spelled out in the statutory report, "the validity of certain factors in the report is of little, if any, relevance." Br. in Opp. 13-14. The proposition that an

deference has been manifested in other decisions as well. In *Smith-Corona Group, Consumer Products Division, SCM Corp.* v. *United States*, Appeal No. 82-24 (C.A.F.C. Aug. 9, 1983), the new Federal Circuit found that "the *foreign policy repercussions of a dumping determination*, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor" (Slip op. at 4 (emphasis added)) and that the decisions of the Secretary are entitled to "tremendous deference," *id.* at 36.

The Federal Circuit's holding that allegations of bad faith administrative conduct are not justiciable is contrary to the vast weight of authority and accepted principles of American jurisprudence. Pet. 17-20. Its extreme deference to the agency charged with the administration of a regulatory statute because of perceived foreign policy implications poses basic questions as to the proper balance between the needs of the executive and the mandate of Congress.

The antidumping law is not a foreign policy tool of the executive. It does not stem from the President's constitutional authority to conduct foreign policy, but rather from Congress' power to regulate interstate and foreign

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administrator may consider criteria in addition to those established in a relevant statute is, in itself, rather dubious. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 412; *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 508-11 (1981). Even if the Secretary is permitted to consider factors *in addition to* those required by section 617, there is no authority for the proposition that the *bona fides* of the report and recommendation specifically mandated by that statute may be ignored by a reviewing court. The Federal Circuit's excessive deference to the Secretary has enabled him to circumvent not only the extensive procedural safeguards of the 1979 amendments, but the limited procedures of section 617 as well.

commerce. This Court may find that the foreign policy implications of the antidumping law require that some balance be struck in its administration and judicial enforcement. But the blind deference of the Federal Circuit strikes no balance. Rather, it ignores the regulatory nature of the statute and permits selective enforcement of the antidumping law to become a tool of foreign policy. It further relegates the judiciary to the role of a passive witness to agency action without jurisdiction to ensure proper implementation of the Congressional mandate. The extreme measure of declaring that allegations of bad faith in the administration of a key Congressional regulatory program are nonjusticiable warrants review by this Court so that definite guidelines for the reviewing responsibilities of the new Federal Circuit may be established.

3. This Proceeding Will Not Become Moot

Contrary to the assertions of the government, this action will not become moot upon liquidation of the customs entries covered by the April 28, 1980 settlement agreements. The agency action under challenge falls clearly within the exception to the mootness doctrine governing conduct which is capable of repetition yet evading review. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

Judicial review of future use of this compromise authority may be avoided by the prompt liquidation of the compromised customs entries. Liquidation normally occurs within six weeks of entry into the customs territory of the United States, S. Rep. No. 249, 96th Cong., 1st Sess. 67, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 453, a duration far shorter than even expedited judicial proceedings. Thus, a future compromise will evade review because liquidations made pursuant to settlement

will moot any controversy prior to litigation.[3] *E.g.*, *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125-26 (1974).

The government's obvious intention to employ section 617 in the future makes this controversy likely to re-occur and injure petitioners. The government's brief demonstrates that it fully intends to utilize the general compromise authority of section 617 in the future. Br. in Opp. 10. It seeks unfettered discretion to choose between compromise and use of the enforcement proceedings mandated by the antidumping law. It further seeks to insulate its enforcement decisions from participation by interested domestic parties or effective judicial review.

T.D. 71-76, the Japanese television dumping finding, remains in force, *see* 48 Fed. Reg. 37,506 (1983), and the imposition of antidumping duties on current and future imports of Japanese television receivers could be compromised. Moreover, antidumping investigations of color television receivers imported from Taiwan and the Republic of Korea have been initiated at the behest of members of petitioners, 48 Fed. Reg. 23,879 (1983), and antidumping duties potentially due on imports covered by those proceedings could also be compromised. Petitioners therefore have a "reasonable expectation" that section

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[3] The government's suggestion that future compromise will not evade review because of the injunctive power of the courts is, at best, specious. It contends that, "as the lengthy history of this and related litigation demonstrates, . . . it is clear that an aggrieved party with a likelihood of success on the merits could obtain injunctive relief to prevent implementation of the settlement until such time as he has obtained judicial review." Br. in Opp. n.7. If this Court denies certiorari in this proceeding, however, few, if any, aggrieved parties could show a likelihood of success on the merits in future cases so as to obtain the grant of injunctive relief.

617 will again be employed to compromise liability for antidumping duties imposed for their benefit. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125-27 (1974).

Moreover, there is some authority that liquidations made pursuant to the settlement agreements are not final and conclusive as to petitioners. Although a dispositive precedent does not exist, the United States Court of Customs and Patent Appeals ("CCPA") has held liquidations void *ab initio* where premised upon an unlawful legal foundation.[4] *United States* v. *Cajo Trading, Inc.*, 403 F.2d 268 (C.C.P.A.), *cert. denied*, 393 U.S. 827 (1968) (liquidations void when based upon invalid Presidential proclamation); *United States* v. *C.O. Mason, Inc.*, 51 C.C.P.A. 107, C.A.D. 844, *cert. denied*, 379 U.S. 999 (1965) (liquidations void when based upon unconstitutional statute). If petitioners prevail on the merits, the liquidations could be held void under the authority of *Cajo* and *Mason*.[5] The present liquidations accordingly will not moot this controversy.

CONCLUSION

The decision of the United States Court of Appeals for the Federal Circuit fundamentally alters the statutory

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[4] Petitioners sought injunctions of any implementation of the settlement agreements because of the absence of a dispositive ruling on the void liquidations doctrine.

[5] The government asserts that this action will become moot upon completion of liquidation, citing 19 U.S.C. § 1514(a) (1976 & Supp. V 1981). Br. in Opp. 8. The government's reliance on section 1514 is misplaced. Section 1514 governs only the rights of *importers* to contest liquidations. In *United States* v. *A.N. Deringer, Inc.*, 593 F.2d 1015 (C.C.P.A. 1979), the CCPA found that Congress had effectively eliminated the force of *Cajo* and *Mason* in the realm of an importer's protest under section 1514, but the court expressly re-

scheme enacted by Congress for antidumping and countervailing duty proceedings and raises important questions as to the role of the new Federal Circuit in overseeing the administration of these important statutes. The issues presented in this petition have wide-ranging implications affecting billions of dollars of imports of products involving virtually every sector of the United States economy. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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jected the government's invitation to overrule *Cajo* and *Mason* in other potential applications. *Id.* at 1020. Liquidations remain open to challenge by interested parties (other than importers) who rely on jurisdictional provisions other than section 1514. The government's claim of finality accordingly must fail, for petitioners are not importers and can rely on 28 U.S.C. § 1581(i) (Supp. V 1981) as the jurisdictional basis for their challenge to these void liquidations.